

CASE NO.:
Appeal (civil) 2283 of 2008

PETITIONER:
B.S.N.L. Ltd. & Anr

RESPONDENT:
Bhupender Minhas & Ors

DATE OF JUDGMENT: 31/03/2008

BENCH:
Dr. ARIJIT PASAYAT & P. SATHASIVAM

JUDGMENT:
J U D G M E N T
REPORTABLE

CIVIL APPEAL NO. 2283 OF 2008
(Arising out of S.L.P. (C) No.4778 of 2004)
With
CIVIL APPEAL NO. 2284 OF 2008
(Arising out of S.L.P. (C) No.3232 of 2004)
CIVIL APPEAL NO. 2287 OF 2008
(Arising out of S.L.P. (C) No.6225 of 2004)
CIVIL APPEAL NO. 2286 OF 2008
(Arising out of S.L.P. (C) No.6307 of 2004)

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. These appeals involved identical issues. While two appeals are against the judgment of the Himachal Pradesh High Court, the other two are against the judgments of the Punjab and Haryana High Court.

3. The controversy lies in a very narrow compass. Writ petitions were filed by the respondents in each case questioning correctness of a stipulation in the "Notice Inviting Tender" (in short 'NIT') containing a disqualification clause which disentitled an intending tenderer to submit tender whose near relative is working in any of the units of the appellant-BSNL. According to the writ-petitioners such a prohibition was impermissible. It was submitted that if the ultimate intention was to ensure that a person working in the unit will not be able to influence the decision-making process in respect of the tender, the same is irrelevant if the person concerned is holding a post of Class III or Class IV. The Himachal Pradesh High Court referred to an earlier order passed by a Division Bench of the High Court in Narinder Kumar v. Union of India and Anr. (C.W.P. No.33 of 1995), where a similar stipulation was struck down. Accordingly, the High Court held that the stand of the respondents in the writ petition with reference to the communication issued by the Bharat Sanchar Nigam Limited bearing no.151-08/2002 O&M/38 dated 11.9.2002 cannot be sustained. It was observed that Rule 4 of Government of India's CCS (Conduct) Rules, 1964 had no relevance. Accordingly, the writ petition was allowed by order dated 24.5.2003 in Civil Writ Petition no.122/2003. The said decision was followed in Civil Writ Petition no.269(M/B) of 2003 by order dated 13.8.2003. The

Punjab and Haryana High Court has expressed a similar view in Civil Writ Petition no.12799 of 2003 by order dated 4.11.2003 and Civil Writ Petition no.18439 of 2003 by order dated 9.1.2004.

4. The appellants' stand is that the stipulation is essentially a policy decision that too in a contractual matter and the High Court should not have interfered.

5. Respondents submitted that in view of the irrationality, the High Court in each case was justified in its view.

6. It appears that the Delhi High Court had occasion to deal with a similar issued in S.N. Engineering Works v. Mahanagar Telephone Nigam Ltd. 1996(37) DRJ446. The conditions which were under consideration of the Delhi High Court were clauses (J) and (K) of NIT providing as follows:

"(J) The contractor shall not be permitted to tender for works in MTNL (responsible for award and execution of contracts) in which his near relative is posted as JAO/AAO/AO or an officer in any capacity between the grades of S.E. and A.E. both inclusive. He shall also intimate the names of the persons, who are working with him in any capacity or are subsequently employed by him, and who are near relatives to any officer in MTNL. Any breach of this condition by the Contractor would render him liable to be removed from the approved list of contractors of this department.

(K) The contractor shall give a list of MTNL employees related to him."

9.2 Every tender has to be accompanied by a declaration to be signed by the contractor in the following proforma which has a footnote defining the term "near-relative":-

APPENDIX-V(DECLARATION) APPENDIX-V

I/WE hereby declare that none of my/our relatives are employed in any capacity in any of the units of M.T.N.L./D.O.T. I/We shall also intimate the names of persons who are working with us in any capacity or are subsequently employed by us and who are near relatives to any officer in the M.T.N.L./D.O.T. I/We am/are aware that any breach of this condition would result in immediate termination of contract/cancellation of the existing contract/cancellation of the existing contract/contracts and also forfeiting of my/our security deposit held by Mtnl, Delhi.

NOTE: "The term 'near relatives' means wife/husband/parents and grand parents/children/ grant children brothers/ sisters/ uncles/ aunts/cousin and their corresponding in-laws."

Name of The CONTRACTOR
CAPACITY in which signing)
Station

Date"

7. It is to be noted that the aforesaid conditions specified the category of the employees to whom the restrictions applied. Two conditions were stipulated. One is a ban on the category of officers, while there was a necessity of intimation so far relatives in respect of other posts. Para 9.2 deals with an undertaking which refers to "any capacity". In para 18 of the judgment it was noted as follows:

"It is pertinent to note that the petitioners are not prohibited from carrying on business activity of the nature involved in the contracts which they wish to enter with the MTNL. All that has been said is that Mtnl would not deal with such contractors as have their relations of a defined category serving in the MTNL. The fundamental right to trade or business of the petitioners is not at all affected. The validity of the restriction so imposed has to be tested not reference to clause (6) of Article 19 of the Constitution but on the anvil of Article 14 of the Constitution. Since entering into the contract is not an employment the applicability of Article 16 of the Constitution is also not attracted."

The stress was on a defined category.

8. The judgment of the Delhi High Court did not relate to BSNL and related to department of telecommunication. The concerned officials were Junior telecom officers.

9. In Air India Ltd. v. Cochin International Airport Ltd. and Ors. (AIR 2000 SC 801) it was observed at para 7 as follows:

"There can be no compulsion or the authority to award the contract in favour of the private party."

10. In Directorate of Education and Ors. v. Educomp Datamatics Ltd. and Ors. (AIR 2004 SC 1962) after referring to the decision in Tata Cellular v. Union of India (1994 (6) SCC 651), it was observed as follows:

"9. It is well settled now that the courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular v. Union of India¹. After examining the entire case-law the following principles have been deduced: (SCC pp. 687-88, para 94)

"94. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in

which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure." (emphasis supplied)"

xxx

xxx

xxx

12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

11. The ultimate objective appears to be that the official concerned should not be in a position to influence the decision-making process. Then the question would be whether a person belonging to Class III or Class IV can be in a position to do so. It can certainly be provided that other things being equal, preference will be given to those whose relatives are not in employment in any unit. In the instant case the period for

contract is stated to be over. The conditions as noted in the Delhi High Court judgment appear to be rational.

12. The authorities can certainly consider the methodology indicated above in future. So far as the present appeals are concerned, the High Courts decisions cannot be sustained as correct principles have not been kept in view. But in the absence of any order of stay, the appeals have become infructuous by passage of time.

13. The appeals are accordingly disposed of. No costs.

JUDIS